FINAL STATEMENT OF REASONS
ASSESSMENT OF ADMINISTRATIVE PENALTIES
Department Reference Number: R-97-24

PROBLEM, REQUIREMENT OR OTHER CONDITION ADDRESSED

California Health and Safety Code (HSC) Section 25187(a)(4) provides criteria for assessing administrative penalties for violations of hazardous waste requirements. Prior to July 15, 1997, the Department of Toxic Substances Control (DTSC) assessed administrative penalties based on these criteria and on its "Policy for Determining Civil and Administrative Penalties, #EO-93-015-PP" (Penalty Policy), dated December 7, 1993. However, the Penalty Policy was replaced by interim regulations on July 15, 1997, until December 31, 1998, pursuant to Senate Bill 523 (Ch. 938, Stat. 1995). DTSC proposed permanent regulations on September 12, 1997. The rulemaking was not completed within one year and the proposed rules lapsed. Subsequently, the interim regulations were replaced by emergency regulations on January 14, 1999. DTSC then proposed permanent regulations on April 9, 1999. However, DTSC withdrew these proposed regulations for revision. The emergency regulations lapsed on January 4, 2000. DTSC proposed to adopt Article 3 as permanent regulations on February 11, 2000 and held a public hearing on March 28, 2000. That version of the regulations was revised in response to the comments. The revised proposed regulations were resubmitted for adoption with a new 45-day public comment period beginning December 29, 2000 and public hearing on February 14, 2001. These regulations were again revised and resubmitted for a 15-day public comment period ending May 21, 2001.

The proposed regulations enhance the ability of DTSC and the Certified Unified Program Agencies (CUPAs) to carry out administrative enforcement in a manner consistent with U.S. Environmental Protection Agency (U.S. EPA) policies and HSC Section 25187(a)(4) by providing a standard and systematic approach to the assessment of administrative penalties. This approach is based on the violation's potential harm and the extent of deviation from hazardous waste management requirements. A violation is classified, using specific criteria, as either major, moderate, or minimal for each of these two factors. A penalty matrix is used to select an "initial penalty" that corresponds to the classification of the violation. DTSC may apply adjustment factors to the initial penalty. These factors allow for consideration of any economic benefit gained or cost of compliance avoided through noncompliance and the violator's intent in committing the violation.

The adjusted initial penalty or "base penalty" for each violation is added to give a "total base penalty." Additional adjustment factors, pertaining to the violator's cooperation, prophylactic effect, compliance history, and ability to pay, can be applied to the total base penalty. After this series of adjustments, the resulting penalty assessed is the final penalty. The proposed regulations provide criteria for these adjustments and a practical method for DTSC, CUPAs, and other entities that have authority to issue administrative orders, to

determine an appropriate penalty allowing for professional judgment while maintaining statewide consistency.

In addition, the proposed rulemaking will allow the specificity provided in DTSC's Penalty Policy to be put into regulation in accordance with Government Code Section 11425.50(e). This Government Code Section states that as of July 1, 1997, a penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, or standard of general application unless it has been adopted as a regulation.

EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

Federal regulations to implement federal statutes do not provide any criteria for the assessment of penalties. However, there is a U.S. EPA policy, entitled "RCRA Civil Penalty Policy," dated October 1990, which provides guidance in assessing penalties under federal statutes. DTSC's proposed regulations are similar to the U.S. EPA's RCRA Civil Penalty Policy.

STUDIES RELIED ON

Article 3 was developed based on the prior version of the regulations, DTSC's Penalty Policy, and the U.S. EPA's RCRA Civil Penalty Policy. Each employs a penalty matrix using the extent of deviation and the potential harm to the public health and the environment. Concerns have been expressed that the penalty amounts in the regulations are higher than the federal penalties. While some amounts are higher, others are lower. DTSC has attempted to create a matrix that is fair where the amount in each cell of the matrix makes sense in relation to all the other cells. The progression of amounts from minimal to major is better related to the statutory criteria in DTSC's regulations than it is in the federal policy. It should also be noted that the federal penalties have been increased by a ten percent inflation factor allowable by Title 40, Code of Federal Regulations, Part 19. In other words, the maximum penalty under the federal policy is now $27,500, instead of $25,000. Each policy also allows for multiple day penalties, deprives the violator of the economic gain from the noncompliance, and allows consideration of certain factors for adjusting the penalty.

DTSC also reviewed comments on the regulations proposed on September 12, 1997. Although that rulemaking lapsed because it was not completed within the allowable time period for adopting regulations, DTSC considered the comments and modified the proposed regulations as appropriate. Furthermore, DTSC considered comments received during the April/May 1999 and February/March 2000 public comment periods

and during public workshops held in September 2000.

DTSC has found this rulemaking project to be exempt under the California Environmental Quality Act (CEQA). A draft of the Notice of Exemption is available for review with the rulemaking file and will be filed with the State Clearinghouse when the regulations are adopted.

ALTERNATIVES CONSIDERED

DTSC has determined that no alternative would be more effective in providing a systematic approach to the assessment of administrative penalties or be as effective or less burdensome to the affected persons than the proposed regulations.

LOCAL MANDATE DETERMINATION

DTSC has determined that adoption of these regulations creates no new local mandates.

DETAILED STATEMENT OF REASONS/NONCONTROLLING PLAIN ENGLISH SUMMARY

A detailed statement of reasons for each section follows.

1. Table of Contents:

This section adds the new Article 3, Sections 66272.60 through 66272.69, to the Table of Contents for Chapter 22, Division 4.5 of Title 22, California Code of Regulations (CCR).

2. Section 66272.60 (Applicability):

This section describes the applicability of Article 3 as it pertains to the assessment of administrative penalties. Each of the subsections is discussed below.

(a): This subsection states that Article 3 of Chapter 22 of Division 4.5 of Title 22 CCR applies only to the assessment of administrative penalties in administrative enforcement orders issued pursuant to HSC Section 25187. This provision is necessary to make clear when Article 3 applies. A nonsubstantive wording change was made to improve clarity.

The second sentence of this subsection states that Article 3 does not apply to minor violations as defined in HSC Section 25117.6 unless the minor violation is subject to a penalty in accordance with HSC Section 25187.8(g), such as when a penalty is warranted or required by the federal act (RCRA). This sentence is necessary to make clear that a penalty can be assessed for a minor violation and in such a case, the penalty for the minor violation will be assessed according to the method presented in Article 3. A non substantive wording change was made to this sentence to improve clarity.

This subsection also states that Article 3 does not apply to penalties assessed pursuant to HSC Sections 25244.18(d)(2), 25244.21(a) and 25244.21(b) regarding requirements for source reduction evaluation review, plans, and reports. Those sections establish penalties of up to $1,000 per day for each violation, while all other administrative penalties are up to $25,000 per day for each violation. The proposed regulations use a matrix based on a maximum of $25,000 per day for each violation. The proposed method is not appropriate for the calculation of penalties with a lower maximum. Therefore, this provision is necessary to exclude source reduction violations from this rulemaking.

Lastly, this subsection states that Article 3 does not apply to the settlement of an enforcement action. Settlement negotiations may take other factors into account. For example, penalties may be compromised based on litigation factors or the penalties for self-disclosed violations may be reduced under the “Unified Cal/EPA Policy on Incentives for Self-Evaluation,” (December 15, 1998). This provision is necessary to make clear that Article 3 applies only to the assessment of penalties in administrative orders and not to settlements.

(b): This subsection states that for purposes of Article 3, “Enforcement Agency” is defined as any agency having the authority to issue administrative orders pursuant to HSC Section 25187. Since other entities, such as CUPAs, also have authority to issue such orders, this provision makes clear that Article 3 applies to any agency assessing penalties pursuant to HSC Section 25187.

(c): This subsection states that the Enforcement Agency, in determining an assessed penalty amount for a violation, will determine whether the person being assessed a penalty is being treated equally and consistently with regard to the same types of violations previously assessed against other violators, pursuant to HSC Section 25180(d). This language is necessary to make it clear that the Enforcement Agency considers other cases with similar circumstances when assessing administrative penalties, that a person receives fair treatment, and that there is statewide consistency in assessing administrative penalties. The language in this subsection has been reorganized to make it clearer and to eliminate the words “at each step of determining an assessed penalty amount for a

violation." These words go beyond the mandate of HSC 25180(d).

3. Section 66272.61 (Penalty Calculation):

This section states that administrative penalties assessed in administrative enforcement orders issued pursuant to HSC Section 25187 will be assessed following the procedures set forth in Article 3. It also states that the penalty calculated under Article 3 for any single violation per day will not exceed the penalty specified in statute ($25,000 per day for each violation). This section is necessary to make the use of the provisions of Article 3 mandatory and to make clear that penalties are subject to any applicable statutory maximum. Nonsubstantive wording changes were made to this subsection to improve clarity.

4. Section 66272.62 (Determining the Initial Penalty for Each Violation):

This section details how the Enforcement Agency will determine the initial penalty for each violation. The matrix presented in this section is the tool the penalty assessors will use to arrive at the appropriate initial penalty for a violation.

(a): This subsection states that the Enforcement Agency will determine an initial penalty for each violation based on two factors: the violation's potential harm and the extent of deviation from hazardous waste management requirements. This provision is necessary to specify the two primary considerations for determining an initial penalty. The word "actual" has been removed from this subsection when referring to harm to improve clarity and to address comments submitted by the regulated community.

(b): This subsection and related subsections, (b)(1) and (b)(2), describe how potential harm of the violation is factored into determining the initial penalty for each violation. For consistency, "actual" has been removed from this subsection when referring to harm.

(b)(1): This subsection states that the Enforcement Agency shall consider potential harm to public health or safety or the environment when using the initial penalty matrix in Subsection 66272.62(d). This provision is necessary to make clear that this subsection addresses the statutory mandate of HSC Section 25187(a)(4), which is to take into account, among other criteria, the nature, circumstances, extent, and gravity of the violation.

Actual and potential harm are treated the same way because the Hazardous Waste Control Law is preventive in nature. The assessment of the gravity of a violation should be based on the potential harm that could occur as a result of the violation, not on whether the

violator was unlucky enough to have the potential harm actually occur. The same philosophy of prevention is evident in the federal Resource Conservation and Recovery Act (RCRA) program. DTSC is the Agency authorized to implement the RCRA Program in California. For consistency, “actual” has been removed from all parts of this subsection when referring to harm.

(b)(2): This subsection and related subsections, (b)(2)(A) through (b)(2)(C), define the categories for degree of potential harm. These categories are defined as “major,” “moderate,” or “minimal” depending on the extent of threat the characteristics and/or amount of the substance presents to human health, safety, or the environment and the level of potential harm as indicated by the circumstances of the case. This provision is consistent with the statutory mandate to consider the nature, circumstance, extent, and gravity of each violation. These definitions, which are discussed below, are necessary to clarify the definition of each category. For consistency, “actual” has been removed when referring to harm in this subsection.

(b)(2)(A): This subsection defines the category “major” as the “characteristics and/or amount of the substance involved represent a major threat to human health or safety or the environment and the circumstances of the violation indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is lacking or substantially below the required amount or it is certain or probable that the coverage would be absent or inadequate.” The language of this subsection has been revised to include a more specific definition of a major potential for harm for a violation of financial requirements to make clear how the definition applies to these violations.

(b)(2)(B): This subsection defines the category “moderate” as the “characteristics and/or amount of the substance involved do not represent a major threat to human health or safety or the environment, and the circumstances of the violation do not indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is significantly below the required amount or it is possible that the coverage would be absent or inadequate.” The language of this subsection has been revised to include a more specific definition of a moderate potential for harm for a violation of financial requirements to make clear how the definition applies to these violations.

(b)(2)(C): This subsection defines the category “minimal” as “the threat presented by the characteristics and the amount of the substance or by the circumstances of the violation are low or, in the case of a violation of financial requirements, coverage is slightly below the required amount or it is unlikely that the coverage would be absent or inadequate.” The language of this subsection has been revised to include a more specific definition of a minimal potential for harm for a violation of financial requirements and to make clear how

the definition applies to these violations.

(b)(3): This subsection provides the factors that the Enforcement Agency will take into consideration when determining the degree of potential harm. These factors, listed in subsections (b)(3)(A) through (b)(3)(F), take into account the characteristics and amount of the substance involved and the extent to which human or animal life or the environment is threatened. This provision is necessary to specify the factors that the Enforcement Agency will consider when determining the degree of actual and potential harm. For consistency, the word "actual" has been removed when referring to harm in this subsection.

(b)(3)(A): This subsection states that the Enforcement Agency will consider "the characteristics of the substance involved" as a factor in determining the degree of potential harm. An example of a violation having a major potential for harm is an uncovered drum of parathion, a deadly poison. An uncovered drum of hexane, where there are no potential sources of ignition, would have a moderate potential for harm. An uncovered drum of used oil would have a minimal potential for harm.

(b)(3)(B): This subsection states that the Enforcement Agency will consider "the amount of the substance involved" as a factor in determining the degree of potential harm.

(b)(3)(C): This subsection states that the Enforcement Agency will consider "the extent to which human life or health is threatened" as a factor in determining the degree of potential harm.

(b)(3)(D): This subsection states that the Enforcement Agency will consider "the extent to which animal life is threatened" as a factor in determining the degree of potential harm.

(b)(3)(E): This subsection states that the Enforcement Agency will consider "the extent to which the environment is threatened" as a factor in determining the degree of potential harm.

(b)(3)(F): This subsection states that the Enforcement Agency will consider "the extent to which potable water supplies are threatened" as a factor in determining the degree of potential harm.

(b)(4): This subsection states that when determining the potential harm for violations of financial requirements, the amount of closure, postclosure, or corrective action costs for which there is no financial assurance or the amount of required liability coverage that is absent, and the likelihood that injury or damages, if they occur, will not be compensated due to an inadequacy in the coverage must be considered. This subsection has been

added to make more specific how the potential harm for financial requirement violations will be determined.

(b)(5): This subsection states that a violation must involve the actual management of hazardous waste, including the absence of adequate financial assurance for closure, postclosure, corrective action or financial liability coverage, as opposed to a record-keeping violation, to have a major potential for harm. This subsection also defines "record-keeping" for purposes of this article. This provision and the related subsections, (b)(5)(A) through (b)(5)(C), are necessary to define record-keeping and to clarify that record-keeping violations do not present a major potential for harm. The language of this subsection has been revised to improve clarity and to include the absence of adequate financial assurance as a violation that can have a major potential for harm. This subsection and related subsections have been redesignated from (4) to (5) to accommodate the addition of subsection (4).

(b)(5)(A): This subsection provides an example of a record-keeping violation as opposed to a violation that could present a major potential for harm because inspections were not conducted. A nonsubstantive wording change was made to improve clarity.

(b)(5)(B): This subsection gives an example of a manifest violation to show the difference between a record-keeping violation and a violation that could be a major potential for harm.

(b)(5)(C): This subsection presents an example using the requirement for a waste analysis plan to illustrate a record-keeping violation versus one that could present a major potential for harm.

(b)(6): This subsection states that a financial assurance violation can be either a record-keeping violation or a hazardous waste management violation depending on the type of violation. This provision is needed to clarify how a requirement that might appear to be record-keeping in nature, may be a management requirement with a major potential for harm. For example, assume that an insurance policy for financial assurance for closure lapses; this financial assurance no longer exists. This situation could result in a major potential for harm if contamination is present, but there are no funds to remediate the site. A failure to have a copy of the current policy available for inspection is a record-keeping violation because the policy is in effect, even though it is not available for inspection. This subsection has been revised to include postclosure and corrective action as parts of financial assurance that could be affected by either a record-keeping violation or a hazardous waste management violation. This subsection has been redesignated from (5) to (6) to accommodate the addition of subsection (4). This addition is necessary to

include requirements of financial assurance.

(b)(7): This subsection states that groundwater monitoring record-keeping is a fundamental part of groundwater monitoring requirements. Violations in groundwater monitoring record-keeping could lead to potential harm to the environment if, for example, the violation causes an inability to detect releases to groundwater. This provision is necessary to clarify what types of violations are merely record-keeping versus violations that could result in a major potential for harm. An example of a groundwater monitoring record-keeping violation with a major potential for harm is the failure to have a sampling and analysis plan. An example of a groundwater monitoring record-keeping violation with a moderate potential for harm is, depending on the circumstances, incomplete recording of equipment calibration. An example of a groundwater monitoring record-keeping violation with a minimal potential for harm is, depending on the circumstances, recording the depth to groundwater at less than the required accuracy. For consistency, the word "actual" has been removed when referring to harm in this subsection. This subsection has been redesignated from (6) to (7) to accommodate the addition of the subsection (4).

(c): This subsection discusses the extent of deviation of the violation and is necessary to make clear how the Enforcement Agency uses extent of deviation of the violation when determining the initial penalty for each violation using the matrix in subsection (d). Related subsections, (c)(1) through (c)(4), are discussed below.

(c)(1): This subsection states that the Enforcement Agency will consider the extent of deviation from requirements when using the matrix in subsection (d). This subsection is necessary to implement, in part, the statutory mandate of HSC Section 25187(a)(4) that requires the Enforcement Agency to take into account, among other things, the nature, circumstances, extent, and gravity of the violation.

(c)(2): This subsection defines the categories of "extent of deviation" from requirements. These categories, "major," "moderate," and "minimal," are defined in related subsections, (c)(2)(A) through (c)(2)(C), which are presented below. This language is necessary to make clear how to categorize the extent of deviation and to provide consistent definitions for the extent of deviation categories.

(c)(2)(A): This subsection defines the "major" category of extent of deviation from requirements as occurring when "the act deviates from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some of its provisions are not complied with."

(c)(2)(B): This subsection defines the "moderate" category of extent of deviation from requirements as occurring when "the act deviates from the requirement, but it functions to some extent even though not all of its important provisions are complied with." A nonsubstantive wording change was made to improve clarity.

(c)(2)(C): This subsection defines the "minimal" category of extent of deviation from requirements as occurring when "the act deviates somewhat from the requirement. The requirement functions nearly as intended, but not as well as if all provisions had been met."

(c)(3): This subsection states that for requirements with more than one part, the Enforcement Agency will consider the extent of violation in terms of the more significant requirement. This subsection is needed to simplify how the Enforcement Agency will evaluate the extent of deviation for a requirement with multiple sub-requirements. It also safeguards the Enforcement Agency from underestimating the extent of deviation in this type of situation by requiring the Enforcement Agency to focus on the most significant requirement. A nonsubstantive wording change was made to clarify that the Enforcement Agency would focus on the most significant requirement instead of the more significant requirement.

(c)(4): This subsection demonstrates how to determine the extent of deviation of a violation. This subsection is needed to clarify, by using an example, how the extent of deviation can vary for a single requirement depending on the specifics of the violation.

(d): This subsection presents the matrix the Enforcement Agency will use to determine the initial penalty for each violation. The parameters for the matrix are potential harm and the extent of deviation from the regulatory requirement. The penalty amounts are scaled from zero to the statutory maximum of $25,000 per day. This maximum amount is in the matrix cell representing the most serious violations, those that fall into the category of having a major potential harm and major extent of deviation. Each matrix cell has an upper and lower limit for the penalty dollar amount, as well as a midpoint value shown in parentheses. The penalty ranges in the matrix cells are similar to the amounts in U.S. EPA's RCRA Civil Penalty Policy. For each violation, the Enforcement Agency will select the appropriate category for the two parameters and choose a penalty amount within the range provided in the matrix cell. Having the range instead of a single number allows some flexibility, depending on the circumstances of each violation, but generally the midpoint of the range (in parenthesis) would be selected. This provision is needed to show the tool the Enforcement Agency will use to assess an initial penalty amount and allow the Enforcement Agency discretion in modifying the initial penalty amount based on circumstances specific to the case. The word "actual" has been removed when referring to harm in this subsection.

DETERMINATION OF INITIAL PENALTY MATRIX
(in dollars)

EXTENT OF DEVIATION	**POTENTIAL HARM**		
	Major	**Moderate**	**Minimal**
Major	25,000 (22,500) 20,000	20,000 (17,500) 15,000	15,000 (10,500) 6,000
Moderate	20,000 (17,500) 15,000	15,000 (10,500) 6,000	6,000 (4,000) 2,000
Minimal	15,000 (10,500) 6,000	6,000 (4,000) 2,000	2,000 (1,000) 0

5. Section 66272.63 (Initial Penalty Adjustment Factors)

This section describes the factors the Enforcement Agency will consider to adjust the initial penalty amount. This provision is necessary because the specification of adjustment factors will provide a consistent basis for raising or lowering the initial penalty.

(a): This subsection states that the violator's intent in committing the violation will be considered for adjusting a violation's initial penalty. Guidelines are provided to assist the Enforcement Agency in determining the amount of adjustment for the violator's intent. The guidelines are as follows:

ADJUSTMENT FACTORS FOR VIOLATOR'S INTENT

ADJUSTMENT FACTOR	CIRCUMSTANCE
Downward adjustment of 100 percent	Violation was completely beyond the control of the violator.
Downward adjustment of 0 to 50 percent	Violation occurred despite good faith efforts to comply with regulation(s).
No adjustment	Violation indicated neither good faith efforts nor intentional failure to comply.
Upward adjustment of 50 percent to 100 percent	Violation was a result of intentional failure to comply.

The adjustment for intent allows the Enforcement Agency to fulfill the statutory mandate in HSC Section 25187(a)(4) to consider the nature and circumstances of the violation in assessing a penalty. The starting point is that everyone is expected and required to comply with the law. Where the facts concerning the violation show prior knowledge, motive, willfulness, negligence, or malice, an upward adjustment may be made. Where the facts show good faith efforts above and beyond the efforts ordinarily made, a downward adjustment may be made. A downward adjustment of 100 percent is used if the violation was completely beyond the control of the violator, resulting in the elimination of the penalty. The adjustment for intent is applied to the initial penalty for each violation and to penalties for multiple days and multiple violations as provided under Sections 66272.64 and 66272.65. Two nonsubstantive wording changes were made for clarity.

Depending on circumstances, an example of a downward adjustment of 100 percent would be a hazardous waste release due to a catastrophic earthquake at a facility where all required management provisions had been met. Since the violation was beyond the control of the violator, no penalty would be assessed.

A downward adjustment of 0 to 50 percent is used if the violation occurred even though good faith efforts were made. For example, if the initial penalty was $1,000 and the downward adjustment was 50 percent, this would result in a penalty of $500. Depending on circumstances, an example of this type of adjustment would be the failure to provide the annual training required of facility personnel, as specified in 22 CCR Section 66264.16(c), due to a prolonged illness of the instructor if the facility documented unsuccessful efforts to find a replacement.

No adjustment is made if the violation indicated neither good faith efforts nor intentional failure to comply. Depending on circumstances, an example would be an inadvertent failure to include all required information on some container labels.

An upward adjustment of 50 percent to 100 percent is used if the violation was the result of intentional failure to comply with the regulations. If the initial penalty was $1,000 and the upward adjustment was 50 percent, this would result in a penalty of $1,500. Depending on circumstances, an example would be a facility that did not install secondary containment for tanks containing hazardous waste, claiming financial hardship, while the facility constructed a state-of-the-art office building for management.

(b): This subsection clarifies that after the adjustment factors are applied to the initial penalty, the resulting amount may no longer be within the penalty range specified in the originally selected matrix cell. The resulting adjusted penalty could be higher or lower than the range. To improve clarity, a nonsubstantive wording change was made in this subsection.

(c): This subsection states that the adjusted penalty shall be increased by the amount of any economic benefit gained or cost of compliance avoided by the violator as a result of noncompliance, and that the economic benefit, which includes, but is not limited to, avoided costs, delayed costs, increased profits, having the use of capital, and avoided interest, may be added to the penalty up to the statutory maximum for that violation. This provision is necessary because it is imperative that the violator not be allowed to benefit economically by violating hazardous waste requirements. All operators should bear the same costs of compliance. The language in this subsection has been revised to include the words “or cost of compliance avoided” in order to make clear that economic benefit includes avoided and delayed costs of compliance and therefore applies not only to commercial operators but also to nonprofit organizations, public utilities, and other public agencies.

(d): This subsection states that under no circumstances should the adjusted initial penalty for a violation exceed the statutory maximum. This provision is necessary to make clear that the adjustment factors are still subject to the statutory maximum penalties. A nonsubstantive reorganization of the language in this subsection was made to improve clarity.

6. Section 66272.64 (Multiple Violations):

This section is being added to allow the Enforcement Agency to assess a single initial penalty for multiple violations. This section is needed because it has been DTSC’s experience that the sum of separate penalties for each instance of a violation may result in

a penalty that is so large it does not reflect the nature, circumstances, extent, and gravity of the violations; nor is it necessary to have the requisite prophylactic effect on the violator or the regulated community. This section is needed to provide a method to deal with multiple violations. Subsections (a) through (d) are discussed below.

(a): This subsection states that the Enforcement Agency has the discretion to assess a single initial penalty for multiple violations. Multiple violations for the purpose of this section are identified as multiple instances of the same violation, where each instance is a violation in itself.

(b) This subsection states that a single initial penalty may be appropriate for multiple violations. This subsection clarifies when violations can be grouped.

(b)(1): An appropriate situation for grouping multiple violations is where a facility has violated the same requirement in various locations or units within a facility. This would not apply when the unit is operated by a contractor or other authority that is different from the operator of the overall site (e.g., a large military base). A wording change was made in this subsection to replace the words “in different” locations with the words “at one or more” locations in order to clarify a multiple violation.

(b)(2): An appropriate situation for grouping multiple violations is where a facility has violated the same requirement on separate occasions unless the facility has been notified of the violation and has had sufficient time to correct the violation. Once the facility has been notified and has had an opportunity to correct a violation, the facility should not receive a reduced penalty by having continuing violations grouped together as multiple violations. The language in this subsection was revised to improve clarity. This subsection was also rewritten to include the words, “and the violation is not a violation that continues uninterrupted for more than one day,” to distinguish multiple violations from multiday violations.

(b)(3): An appropriate situation for grouping multiple violations is when the violations are not independent or are not substantially distinguishable. The language of this subsection was changed to add the statement, “For such violations, the Enforcement Agency shall consider the extent of violation in terms of the most significant violation.” This statement is necessary to provide guidance that when assessing a single penalty for multiple violations, each of which may carry a different initial penalty, the extent of the most significant violation must be considered.

(c) This subsection states that the Enforcement Agency is to assess separate penalties where it is necessary to deprive the violator of the economic benefit of the violations. A nonsubstantive wording change was made for clarity.

(d): This subsection states that for determining the single initial penalty for multiple violations, the initial penalty matrix presented in Section 66272.62 and 66272.63 is to be used. A nonsubstantive wording change was made to correct a grammatical error.

7. Section 66272.65 (Multiday Violations)

(a): This subsection notes that each day the violation continues is a separate and distinct violation and that the penalty for a continuing violation is to be determined according to this section. This subsection is needed to clarify how to determine penalties for multiday violations. The language in this subsection was modified for simplicity.

(a)(1): This subsection states that for calculating the initial penalty for a multiday violation, the initial penalty for the first day of violation is determined as provided in Section 66272.62 and 66272.63. This subsection makes clear that the penalty for the first day of any violation is the same, whether or not the violation continues.

(a)(2): This subsection states that for days following the first day of violation, the penalties for the subsequent days are to be calculated by first determining two percent of the adjusted initial penalty and multiplying that value by the number of days the violation occurred after the initial day. This subsection, and related subsections, were rewritten to omit the mandatory, presumed, and discretionary designations of multiday penalties and the factors used to assign such designations. Also removed was the multiday penalty matrix and the instructions for using the matrix. These changes were made in response to public concerns that multiday penalties calculated according to the proposed regulations were too large and to remove subjectivity of the multiday penalty calculations.

(b): This subsection states that if the Enforcement Agency fails to respond timely to a violator's written response to an inspection report, the Enforcement Agency may not seek penalties for violations that continue past that time. This requirement is found in Health and Safety Code Section 25185(c)(3). This subsection was redesignated to (b) from (d) to accommodate the removal of the previous subsections.

8. Section 66272.66 (Minor Violations Subject to a Penalty)

This section states that when a "minor violation," as defined by HSC Section 25117.6, is subject to a penalty for any of the reasons specified in HSC Section 25187.8(g), the penalty is to be assessed using the same method as for other violations subject to a penalty. Therefore, the initial penalty for a minor violation subject to a penalty will be assessed using the initial penalty matrix and adjustment factors presented in Sections 66272.62 and 66272.63, respectively. This section is necessary to make clear how penalties will be assessed for this special type of violation. Nonsubstantive wording changes were made to this section to simplify it.

9. Section 66272.67 (Base Penalty)

This section defines the terms base penalty and total base penalty.

(a): This subsection makes it clear that for a violation that is not a multiday violation, the base penalty for that violation is the adjusted initial penalty as determined in accordance with Sections 66272.62 and 66272.63.

(b): This subsection has been added to clarify that the adjusted initial penalty for multiple violations determines the base penalty.

(c): This subsection states that for a multiday violation, the base penalty is the adjusted initial penalty, as determined in accordance with Sections 66272.62 and 66272.63, plus the multiday penalty calculated under Section 66272.65. This subsection has been redesignated from (b) to (c) to accommodate the addition of subsection (b).

(d): This subsection states that the total base penalty for an enforcement action is the sum of the base penalties for all violations. This subsection has been redesignated from (c) to (d) to accommodate the addition of subsection (b).

(e): This subsection has been added to clarify that the base penalty may not exceed the statutory maximum. This subsection was added to ensure that no penalty exceeds the statutory maximum of $25,000 per day per violation.

10. Section 66272.68 (Adjustments to the Total Base Penalty):

This section requires the Enforcement Agency to adjust the total base penalty and describes the specific adjustment factors that are to be considered in the adjustment process. These provisions are necessary to specify the four adjustment factors for the total base penalty and make specific the mandate of HSC Section 25187(a)(4) to consider these factors. Each adjustment factor is discussed below in related subsections, (a) through (d).

(a): This subsection describes “cooperation” as an adjustment factor for the total base penalty. The Enforcement Agency must consider the violator’s cooperation and efforts to return to compliance. The Enforcement Agency presumes that a violator will make all necessary good faith efforts to comply with requirements and, therefore, a cooperative effort to achieve compliance is the standard. An adjustment is made if that standard is exceeded or if it is not reached, and is based on the violator’s efforts to return to compliance after being notified of the violations by the Enforcement Agency.

The Enforcement Agency may adjust the penalty upward or downward, based on the

following “degrees of cooperation/effort”: extraordinary, good faith, recalcitrance, and refusal. This provision is necessary to make clear what the Enforcement Agency considers as a positive or negative effort to return to compliance.

ADJUSTMENT FACTORS FOR COOPERATION

Degree of Cooperation/Effort	Adjustment Factor	Circumstance
Extraordinary	Downward adjustment of up to 25 percent	Violator exceeded the minimum requirements in returning to compliance or returned to compliance faster than requested.
Good Faith	No adjustment	Violator demonstrated a cooperative effort.
Recalcitrance	Upward adjustment of up to 25 percent	Violator failed to cooperate, delayed compliance, created unnecessary obstacles to achieving compliance, or the compliance submittal failed to meet requirements.
Refusal	Upward adjustment of 50 to 100 percent	Violator intentionally failed to return to compliance or to allow clean-up operations to take place. This does not include refusal to allow inspections.

If a violator exhibits “extraordinary” effort by exceeding the minimum requirements in compliance or returning to compliance faster than expected, there would be a downward adjustment of up to 25 percent to the total base penalty. Efforts to be considered include actions taken at the facility that exceed the minimum requirements. Depending on circumstances, an example would be the installation of a leak detection system for a tank containing hazardous waste designed to detect leaks sooner than the 24 hours required by the regulations. These efforts can also include efforts to rectify any damage or environmental harm that could result from the noncompliance in a speedy manner without being told to do so by the Enforcement Agency.

In the second case, no adjustment would be made if a violator exhibits “good faith” effort (i.e., the expected cooperative effort to return to compliance). Depending on circumstances, an example would be a facility that provided copies of a missing

contingency plan to their staff the day after an inspection and within a week certified to the Enforcement Agency that they had done so in a timely fashion.
In the third case, if a violator exhibits “recalcitrance” by failing to cooperate, delaying compliance, creating unnecessary obstacles to achieving compliance, or failing to submit adequate documentation, there is an upward adjustment of 25 percent to the total base penalty. Depending on circumstances, an example would be a facility that only occasionally complies with the requirement to follow its waste analysis plan, in spite of being notified of the violation.

In the fourth case, if a violator “refuses” to cooperate by intentionally failing to return to compliance with the regulations or not allowing cleanup operations to take place, there is an upward adjustment of 50 to 100 percent to the total base penalty. Depending on circumstances, an example would be a facility that still does not follow its waste analysis plan, in spite of a being notified of the violation.

Nonsubstantive word changes were made within the table for clarity.

(b): This subsection, entitled “Prophylactic Effect,” states that the total base penalty may be adjusted upward or downward to ensure that the penalty is appropriate to have a preventive effect on the violator and the regulated community as a whole. This provision is necessary to assure that the magnitude of the penalty is sufficient to act as a deterrent to future noncompliance by both the violator and the regulated community as a whole, but no larger than necessary. An upward or downward adjustment may be appropriate because the total base penalty may be either too low or higher than necessary to have a prophylactic effect.

(c): This subsection, entitled “Compliance History,” details how the Enforcement Agency may adjust the total base penalty downward by five percent for each previous consecutive Enforcement Agency inspection report that has had no violation noted, up to a total reduction of ten percent. This subsection also notes that a separate, additional downward adjustment of 15 percent may be granted if the violator has a current International Organization for Standardization (ISO) 14001 Certificate. According to this subsection, an upwards adjustment of up to a maximum of 100 percent may be made if the violator has demonstrated a history of noncompliance. Continued and repeated violations indicate that previous penalties were not high enough to deter the violator from violating again. However, the Enforcement Agency will use its discretion to ensure that previous violations warrant an upward adjustment. This provision is necessary because HSC Section 25187(a)(4) requires that the Enforcement Agency take into account the violator’s past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health and safety or the environment when assessing penalties. The time frame specified for examining a violator’s compliance history is 5 years, based on the statute of limitations. The Enforcement Agency must consider the factors in subsections, (c)(1) through (c)(3),

when adjusting the penalty for compliance history. A downward adjustment for a history of compliance has been added in response to comments.

(c)(1): This subsection states that the Enforcement Agency will give more weight to previous violations at the site in question than to previous violations at another site owned or operated by the same person. The Enforcement Agency considers violations at the same site to be more significant, although violations at other sites owned or operated by the same person would also receive some weight.

(c)(2): This subsection states that recent violations receive more weight than older violations. The Enforcement Agency considers recent violations to be more significant because they indicate a current pattern of noncompliance.

(c)(3): This subsection states that the same or similar previous violations receive more weight than previous unrelated violations. The Enforcement Agency considers the same or similar previous violations to be more significant than unrelated violations because the operator should have been on notice of this type of problem.

(d): This subsection, entitled “Ability to Pay,” states that if the violator has provided the Enforcement Agency with the financial information necessary to assess the violator’s ability to pay, payment of the final penalty may be extended over a period of time if immediate, full payment would cause extreme financial hardship. This subsection also states that if full payment or time payments would cause extreme financial hardship, the penalty may be reduced.

This subsection further states that no adjustment for ability to pay will be made if the penalty has been adjusted upward because of failure to cooperate, pursuant to subsection (a), or because of compliance history, pursuant to subsection (c). This is necessary because DTSC believes that facilities that fail to cooperate or have a poor compliance history should not have a penalty reduced based on ability to pay.

Ability to pay often can only be taken into account at the time of settlement negotiation because the Enforcement Agency does not have the necessary financial information when it issues the order. If a claim is made that a penalty cannot be paid, the Enforcement Agency will provide the person with the opportunity to provide financial records to its auditors to verify claims of financial hardship. The Enforcement Agency typically requires at least three years of income tax records and corporate audit reports. This provision is necessary because it allows the Enforcement Agency to fulfill its statutory requirement in HSC Section 25187(a)(4) to consider the violator’s ability to pay when assessing penalties.

10. Section 66272.69 (Final Penalty):

This section states that the final penalty consists of the total base penalty, as provided in Section 66272.67, with any adjustments pursuant to Section 66272.68, Adjustments to the Total Base Penalty. This section is necessary to make clear how to calculate the final penalty. This section has been revised to include the words, “The final penalty shall not exceed the statutory maximum,” to ensure that the final penalties are never more than the statutory maximum of $25,000 per day per violation.